CONCERNING THE CONSTITUTIONALITY OF THE LAW REGULATING INTERSTATE RAILWAY RATES.

In summary, the amendment to the "Act to Regulate Commerce," which became a law at the last session of Congress, empowers the Interstate Commerce Commission to prescribe just and reasonable rates for interstate traffic, whenever complaint is made to the Commission that existing rates are unjust, unreasonable, unjustly discriminatory, or unduly preferential; imposes penalties of imprisonment, as well as of fine, in certain cases of violation of the Act; declares that after May 1, 1908, it shall be unlawful for any railroad company to transport, in interstate traffic, any commodity manufactured, mined, or produced by, or which the company owns or is directly or indirectly interested in, except commodities necessary to the conduct of the railroad's business and timber and its manufactured products; and grants to carriers as well as to shippers the privilege of resorting to the Federal Courts to obtain review of all orders of the Commission. The law includes many details which cannot be noticed in a Review article, but most of these pertain to matters of familiar legislation, raise no questions of Constitutionality, and are aside from the scope of this article. Therefore, omitting further reference to such details, and coming directly to the grounds upon which the constitutionality of the law will probably be attacked in the Courts, these will doubtless be the same as were principally debated while the bill was pending in the Senate. They were the following:

1. Congress lacks power to fix rates in interstate railroad transportation.

2. Admitting that Congress has such power, yet its bestowal upon the Interstate Commerce Commission is a delegation of legislative powers which cannot be constitutionally made.

3. The giving of general power to fix rates to the Interstate Commerce Commission amounts to, or necessarily involves, the giving of a preference to the ports of one State over those of another, in violation of Section 9 of Article 1 of the Constitution.

The Supreme Court has never expressly passed upon these objections; that Court has never expressly held, in a case raising the precise point, either that Congress has power to fix the rates

of interstate railroad traffic; or that it can lawfully delegate such power to a board; or that such a law is not in violation of the constitutional provision forbidding the giving of preferences to ports of one state over those of another state.

And yet there is but little probability that an attack upon the law on any of these grounds will succeed; there is, rather, good reason for supposing that, regarded as a scheme of legislation, distinct from possible abuses by the Commission of powers conferred upon them in particular instances, the law will be found to be constitutional; whether it will or will not prove to be wise.

Considering the foregoing objections in their order, we may be reasonably certain that the Supreme Court will affirm that Congress has the power under the Commerce clause of the Constitution to regulate the rates of interstate traffic.

Although the Supreme Court has never expressly so decided, it has settled other principles from which no other conclusion can reasonably be drawn. In the first case which reached the Court, in 1824,[1] Chief Justice Marshall, in defining the commercial power of Congress, described it as the power to prescribe the rule by which commerce is to be governed, a power complete in itself, capable of exercise by Congress to its fullest extent, and acknowledging no limitations other than those expressed in the Constitution; and in further explanation of these statements, he said, "The power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." That is, the dual form of the government of the American commonwealth, as composed of states within a federation, imposes no limitation on the power of Congress over interstate and foreign commerce, since that power is expressly granted to Congress by the Constitution. It is the fulness of the power, as understood by and exercised in the civilized states of the world, that is granted; it is not some peculiar and limited power, but that which is implied by the terms, in the full implication of those terms, which is bestowed upon Congress.

It is frequently contended that Chief Justice Marshall's remarks are mere *obiter dicta*, but such contention is unreasonable. The case which Gibbons *v.* Ogden presented to the Court required it to ascertain and announce the limits of the power of

[1] Gibbons *v.* Ogden, (1824) 9 Wheat. 1.

Congress, and the relation this power bore to that of the States. The pronouncement of the Court upon these topics was a decision upon the very case before it, not mere argument by the way.

But however this may be, these propositions of Marshall have long since become part of the law, by repeated citation, and approval in later cases.[1] The corner stone of the law of interstate commerce is to-day the proposition that the power of regulation is as extensive as is the subject, and is as fully possessed by the Congress of the United States, as like power is possessed by the legislature of any other civilized nation, except in so far as the Constitution itself has imposed restrictions upon its exercise. As a question of law, which is quite distinct from questions of wisdom and sound policy, the rights of the States under the Federal Constitution have no relation to the extent of the power of Congress to regulate commerce, since that power is expressly granted by the Constitution itself.

Moreover, it has been settled for nearly ninety years[2] that, when a power is granted by the Constitution, all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect. There can be no question that the regulation of the rates of transportation is a measure adapted to the regulation of commerce, and appropriate to that end. Indeed, as said by Judge Hammond in Louisville & Nashville Railroad Company *v.* Railroad Commission of Tennessee,[3] the regulation of rates is the most direct, the most vital, of all regulations.

If, therefore, we reason from the settled extent of the powers of Congress, and from the appropriateness of the expedient of regulation of rates to the control of commerce among the States, we must conclude that Congress has the constitutional power to regulate rates of interstate railroad transportation. And the

[1] Leisy *v.* Hardin (1890) 135 U. S. 100; Walling *v.* Michigan (1886) 116 U. S. 446; Interstate Commerce Commission *v.* Brimson (1894) 154 U. S. 471, 472; Scranton *v.* Wheeler (1900) 179 U. S. 159.

[2] McCulloch *v.* Maryland (1819) 4 Wheat. 316.

[3] (1884) 19 Fed. 679.

In Kaeiser *v.* Illinois Central R. Co. (1883) 18 Fed. 153, Judge McCreery considered the followed propositions to be settled:

(2) The transportation of merchandise from a place in one state to a place in another is "commerce among the states"; (3) To fix or limit the charges for such transportation is to regulate commerce; (4) A statute fixing or limiting such charges for transportation from places in one state to places in another state is a regulation of commerce among the States; (5) The power to regulate such commerce is vested by the Constitution in Congress.

dicta of the Court strongly support this conclusion. Thus, Justice Miller in rendering the judgment of the Court in Wabash, St. Louis & Pacific Co. *v.* Illinois[1] said:

> "But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois Court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution."

And Justice Bradley, in his dissenting opinion said, "No one disputes that Congress might, if it saw fit, under its power to regulate commerce among the several states, regulate the matter under consideration," (rates of interstate railroad transportation) "but it has not done so * * *. Does it follow, then, that because Congress has the power to regulate this matter, though it has not exercised that power, therefore the State is divested of all power of regulation? That is the question before us."

Further, the power of Congress to construct or authorize the construction of interstate railroads, although once questioned, has now long been affirmed by the Supreme Court.[2] But the larger power to construct the means of interstate transportation, it would seem, should include the lesser power of regulating the rates to be paid for the transportation over the means, and this has been the practical view taken by Congress. Thus, in the Act incorporating the Union Pacific Railroad Company, in 1862,[3] Congress reserved the right to reduce the fares, if unreasonable in amount, and to fix and establish the same by law, and in the same Act provided for the forfeiture of the entire property of the railroad company to the United States, in case of the failure of the company to complete the work by a specified date, and for legislation by Congress to insure the speedy completion of the roads. By Article II of the Treaty between the

[1] (1886) 118 U. S. 557.

[2] Luxton *v.* North River Bridge Co. (1894) 153 U. S. 525; California *v.* Cent. Pacif. Ry. Co. (1888) 127 U. S. 1. See also the remarks of Mr. Justice Bradley, when sitting at Circuit, in Stockton *v.* Balt. N. Y. R. Co. (1887) 32 Fed. 16, cited with approval in 153 U. S. 532.

[3] 12 Stat. L. 489, 497.

United States of America and the Sisseton and Warpeton Bands of Dakota, or Sioux Indians, proclaimed May 2, 1867,[1] the Indians "ceded to the United States the right to construct wagon roads, railroads, mail stations, telegraph lines, and such other public improvements as the interest of the Government may require over and across the lands claimed by the said bands." By the Act of February 24, 1871,[2] authorizing the Union Pacific Railroad Company to issue bonds for the construction of a bridge over the Missouri River between Council Bluffs, Iowa, and Omaha, Nebraska, Congress reserved to itself power, "at all times, (to) regulate the said bridge and the rates for the transportation of freights and passengers over the same, and the local traffic herein provided for." By another Act of 1871[3] Congress authorized the incorporation of the Texas Pacific Railroad Company, with power to lay out, locate and construct a railroad and telegraph line from a place in Texas to a place in California, and provided that the rates should not exceed those which might be fixed by Congress for carrying freight and passengers over the Union Pacific and Central Pacific Railroads. In 1870 Congress passed an Act authorizing the construction of an international bridge over the navigable waters between the United States and the Dominion of Canada, and provided that in case of disagreement between the parties concerned, the terms for the use of the bridge by railroad companies should be prescribed by the District Court for the Northern District of New York after hearing the respective parties.[4] In 1890, Congress passed a law providing for the incorporation of the North River Bridge Company to build a bridge over the Hudson River, and for the use of the bridge upon reasonable compensation to be approved by the Interstate Commerce Commission.[5] Since railroads, bridges, canals, are all equally highways of commerce, the power of Congress to provide for the construction of all proceeds out of the same Constitutional provision, and the frequent exercise by Congress of the power of construction and of regulation of rates, in particular instances, will powerfully influence the Court to decide that the general power of regulating rates of interstate commerce is in Congress.

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[1] 15 St. L. 506.

[2] 16 St. L. 430.

[3] 16 Stat. L. 573.

[4] Canada Southern R. R. *v.* Internal. Bridge Co. (1881) 8 Fed. 190.

[5] 26 State. L. 268.

Finally, the power of regulating rates, both of internal and of foreign commerce, is possessed by other civilized nations, and is a power appropriate and necessary to the control of commerce in the interest of the public welfare. That power was possessed by the several States before the adoption of the Federal Constitution. Its lesser part, the regulation of rates of commerce within the several States, is still in the governmental organs of each State. It cannot be, that its greater part, the regulation of rates of commerce among the States, was taken from all the organs of government of the American commonwealth by the adoption of the Constitution, but this greater part either still remained in the several States, or passed to the United States under the express grant of the Constitution.[1] For nearly a century it has been settled that the power to regulate interstate and foreign commerce is in Congress, not in the governments of the several States,[2] and it is not a reasonable presumption, that so vital a part or incident of that general power of regulation, as is the fixing of rates of commerce throughout the nation, has perished, and that the American Commonwealth, alone of civilized nations, is without such power.

II. Delegation of Power to the Interstate Commerce to Fix Rates.

This point also has never been expressly ruled by the Supreme Court. But the dicta of its opinions, the observations of its Justices when sitting at Circuit, and the practice of Congress in analogous matters strongly support the conclusion, that the law is also in this respect a valid exercise of Congressional power.

The general principle which controls the extent to which Congress may intrust to administrative officers or boards the carrying out of legislative policies, seems to be, that the power of determining and enacting what the rule of law shall be pertains only to the Legislature, and cannot be delegated; but that the power to carry the rule into execution, together with that of exercising discretion in the application of the rule, may be entrusted to various boards and officers by the Legislature.[3]

[1] U. S. *v.* Brig. William (1808) 2 Halls Amer. Law J. 255.

[2] The decisions of the Supreme Court holding invalid laws of the States which regulated rates of interstate traffic, imply the power of Congress to prescribe the rates. Wabash, etc. Co. *v.* Illinois (1886) 118 U. S. 557.

[3] Justice Woods, when sitting at Circuit in Tilley *v.* Savannah, Florida & Western R. Co. (1881) 5 Fed. 658.

The general question of the power of the Legislature to delegate its functions was early considered by Chief Justice Marshall,[1] in connection with the right of federal courts to regulate the mode of proceeding on executions, and he was of the opinion that while it would not be "contended that Congress can delegate to the Courts, or to any other tribunal, powers which are strictly and exclusively legislative," yet it "may certainly delegate to others powers which the legislature may rightfully exercise itself." * * *

"The 17th section of the judiciary act, he said, and the 7th section of the additional act, empower the Courts respectively to regulate their practice. It certainly will not be contended that this might not be done by Congress. The Courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the legislature, without the intervention of the courts; yet it is not alleged that the power may not be conferred on the judicial department.

"The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." * * *

"The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily."

And in the particular case of railroad rates, it would appear from the remarks of Mr. Justice Brewer in Chicago & N. W. Ry. Co. *v.* Dey,[2] that the provision in the law that "all charges shall be just and reasonable, and every unjust and unreasonable charge is prohibited and declared to be unlawful," is the enactment of the rule of law, while the determination of the rate, which in particular cases is just and reasonable, is the execution of that rule, and may properly be left to the Interstate Commerce Commission.

That it is proper for Congress to confer the power of fixing rates upon the Commission has also been explicitly stated in decisions of the Supreme Court, if not so ruled. Thus, in the case of the Interstate Commerce Commission *v.* Cincinnati, N. O. & T. R. R. Co.,[3] Mr. Justice Brewer, when discussing

[1] Wayman *v.* Southard (1825) 10 Wheat. 43, 46.

[2] (1888) 35 Fed. 874.

[3] (1897) 167 U. S. 494.

the conditions which led to the passage of the Interstate Commerce Commission Law said:

> "Before the passage of the act it was generally believed that there were great abuses in railroad management and railroad transportation, and the grave question which Congress had to consider was how those abuses should be corrected and what control should be taken of the business of such corporations. The present inquiry is limited to the question as to what it determined should be done with reference to the matter of rates. There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable. There is nothing in the act fixing rates. Congress did not attempt to exercise that power, and if we examine the legislative and public history of the day it is apparent that there was no serious thought of doing so."

And in Reagan *v.* Farmers Loan & Trust Company,[1] he had said that the regulation could be carried on by means of a commission, which was "merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation."

The failure of the Supreme Court to comment adversely upon the delegation of power to fix rates by State Legislatures to railway commissions in the numerous cases where the rates were in question,[2] also indicates that there was, in the view of the Court, nothing objectionable in the grant of such powers to a commission, while several of the Justices of that Court when sitting at Circuit, have, at least by way of argument, expressly approved of the bestowal of such powers upon commissions.[3]

A similar question has frequently been before the highest courts of the States in connection with laws providing for State railroad commissions, and the power of legislatures to confer authority upon the Commissions to fix rates has been sustained.[4]

And finally, while the Constitution confers upon Congress many other powers than that of regulating commerce, which it might exercise by direct legislation, yet, from the beginning of the Government, it has in fact, intrusted the application of them

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[1] (1894) 154 U. S. 394.

[2] As in St. Louis & S. F. R. Co. *v.* Gill (1895) 156 U. S. 666; Reagan *v.* Farmers Loan & Trust Co. (1894) 154 U. S., 394.

[3] Justice Woods, in Tilley *v.* Savannah, Florida & Western R. Co. (1881) 5 Fed. 658; Justice Brewer, in Chicago & N. W. R. Co. *v.* Dey (1888) 35 Fed. 874, and Reagan *v.* Farmers Loan & Trust Co. (1894) 154 U. S. 394.

[4] State *v.* Chicago, Mil. & St. P. R. Co. (1888) 38 Minn. 300.

to various bureaus, boards, or departmental officers, and the requirements of practical government admit of no other manner of proceeding.

And so, whether we consider the general practice of the Government, the observations of the Supreme Court, of its Justices at Circuit, or the decisions of the highest courts of the States, we are led to conclude that the bestowal of authority to fix rates on the Interstate Commerce Commission is a lawful exercise of the power of Congress.

III. THE QUESTION OF PREFERENCE OF PORTS OF ONE STATE OVER THOSE OF ANOTHER STATE.

In Article I, Section 9, paragraph 6, the Constitution provides that "no preference shall be given by any regulation of commerce or revenue to ports of one State over those of another," and it has been contended that a law giving general power to the Interstate Commerce Commission to regulate rates of interstate traffic would violate this provision. Upon this point there is no authority of decided cases, and perhaps none is necessary. For it seems clear that the Act does not, in terms, provide for giving a preference to the ports of one state. The rule laid down by the Act is, that "all charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." This is surely not the giving of a preference, and the further provision of the Act, that "the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practice whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum

to be charged; and what regulation or practice in respect to such transportations is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed and shall conform to the regulation or practice so prescribed," it seems equally clear, does not require the Commission to give a preference to the ports of one State over those of another.

The rule that charges shall be just and reasonable, and forbidding those which are unjust, unreasonable and discriminatory is the declaration in the Act of the common law principle;[1] and the prohibiting of rates which are "unduly preferential or prejudicial" can hardly be construed to be a preference to any port. The giving of a preference to the ports of one State over those of another, therefore, is not the positive enactment of the law, nor its direct unavoidable result, but, is at most, the indirect remote consequence of particular erroneous orders of the Commission. Such a situation seems to be within the principle stated in Pennsylvania *v.* Wheeling Bridge Co.,[2] where objection was made to a law of Congress declaring certain bridges over the Ohio River to be lawful structures and post roads of the United States, upon the ground that they constituted such obstruction to navigation as necessarily gave a preference to Wheeling over Pittsburg, in violation of the clause of the Constitution here in question.

The majority of the Court, speaking by Judge Nelson, held that, admitting that the effect of the obstruction was to give an advantage to Wheeling, yet the Act was not obnoxious to the Constitution.

"For, there are many Acts of Congress passed in the exercise of this power to regulate commerce, providing for a special advantage to the port or ports of one State and which very advantage may incidentally operate to the prejudice of the ports in a neighboring state, which have never been supposed to conflict with this limitation upon its power. The improvement of rivers and harbors, the erection of light-houses, and other facilities of commerce, may be referred to as examples. It will not do to say that the exercise of an admitted power of Congress conferred by the Constitution is to be withheld, if it appears, or can be shown, that the effect and operation of the law may incidentally extend beyond the limitation of the power. Upon any such interpretation, the principal object

[1] Reagan *v.* Farmers Loan & Trust Co. (1894) 154 U. S. 397; St. Louis & S. F. R. Co. *v.* Gill (1895) 156 U. S. 666; Munn *v.* Illinois (1876) 94 U. S. 113.

[2] (1855) 18 How. (U. S.) 421.

of the framers of the instrument in conferring the power would be sacrificed to the subordinate consequences resulting from its exercise. These consequences and incidents are very proper considerations to be urged upon Congress for the purpose of dissuading that body from its exercise, but afford no ground for denying the power itself, or the right to exercise it."[1]

While the effect of a rate is quite different from the effect of an obstruction to navigation, yet the principle of this case seems to apply to the present Act; and it is not to be presumed that an exercise by Congress of its power to regulate commerce by regulating the rates of transportation, will he held void, because of the contingency that a particular order of the Commission may violate the clause against preferences. Should a case arise where a particular order of the Commission will be found to violate this provision of the Constitution, it is apprehended that the order, not the law, will be invalidated by the Court.

Of course, the distinction just noted between particular orders of the Commission and the terms of the Act, may arise as well with reference to other points as to the giving of unlawful preferences to the ports of one State over those of another. It may, for example, happen that a rate which the Commission determines to be just and reasonable will be found by the Court to be so unjust and unreasonable as to amount to confiscation of the railroad's property. In such event, that order of the Commission may be held void, but the possibility of such unlawful orders does not render void the provision of the Act empowering the Commission to fix just and reasonable rates. And in determining whether a particular rate is reasonable or unreasonable, it may be the Court will continue to take all the circumstances of the case, not merely the monetary value and earning power of the rate, into consideration.

But all such questions affect the practical operation, not the validity of the Act, and it is reasonably certain, as said at the beginning of this article, that its constitutionality cannot be successfully assailed upon any of the grounds considered.

DAVID WALTER BROWN.

NEW YORK.

NOTE.—The provision in the Act forbidding railroads to transport, in interstate traffic, commodities which they produce, own, or are interested in, suggests an interesting situation, which is perhaps too remote to be considered in the text, but may be referred to in a note.

The Act provides that "from and after May 1, 1908, it shall be unlawful for any railroad company to transport from any

[1] Id. 433.

State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, which it may own in whole, or in part, or in which it may have any interest direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

Possibly it is the fact, and Congress was so advised before passing the Act, that no railroad company doing interstate business exists, which is owned by or directly connected with a mining, or other manufacturing or industrial enterprise, and with a charter empowering it to carry the commodities produced or owned by the latter company; or that no mining or manufacturing corporation exists with a charter authorizing it to build and operate a railroad as a part of or connected with the industrial enterprise, and under which charter an interstate line of railroad has been constructed, and is engaged in carrying the commodities produced or owned by the mining or manufacturing corporation.

If, however, there is any such railroad company or industrial corporation now carrying its own products over its own interstate railroad, pursuant to provisions in charters granted by the States in which the railroad is, then the application to such corporation, of this provision of the Act may be invalid, as in violation of the Fifth Amendment to the Constitution. For the power of Congress to regulate commerce is subject to this amendment;[1] such a corporate franchise granted by a state with respect to interstate commerce, before Congressional action on the subject, is a valid grant and vests a property right in the Corporation,[2] and the substantial destruction of property or of the right to its use is the taking of property under the Fifth Amendment, for which just compensation must be paid.[3]

D. W. B.

[1] Monongahela Navigation *v.* U. S. (1892) 148 U. S. 312, 324, 336.

[2] Id. 329.

[3] U. S. *v.* Lynah (1903) 188 U. S., 445—Other cases citing and approving 148 U. S. 312 are Gulf & Ship Island R. Co. *v.* Hewes (1901) 183 U. S. 77; U. S. *v.* Bellingham Boom Co. (1900) 176 U. S. 216; U. S. *v.* Joint Traffic Assoc. (1898) 171 U. S. 571; Interstate Commerce Commission *v.* Brimson (1894) 154 U. S. 447; Scranton *v.* Wheeler (1900) 79 U. S. 155 ; Fairbanks *v.* U. S. (1901) 181 U. S. 300.